The Taricco Decision: A Last Attempt to Avoid a Clash between EU Law and the Italian Constitution

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The day after having struck down some significant parts of the electoral law, the Italian Constitutional Court (ICC) has released another keenly awaited decision in the *Taricco* saga. The Court has referred (back) to the Court of Justice of the European Union (CJEU) a case that the judges sitting in Luxembourg had already heard before. By the order no. 24, in fact, the ICC has asked the CJEU to clarify whether the decision taken on September 2015 in *Taricco* (C-105/14) does actually leave national courts the power to disregard the same to the extent the effects of that decisions would be (like, in the view of the Court, are) in contrast with a fundamental principle of the Constitution (namely, the principle of legality).

In the case at hand, in fact, the ICC had been requested, among others, to exercise this power in accordance with the counter-limits doctrine in order to prevent the enforcement of the CJEU ruling in *Taricco*. By the counter-limits doctrine (that dates back to the 1973 ICC judgment in *Frontini*), the ICC reserved itself the competence to call into question the application of EU law when it comes to measures that are likely to affect the supreme principles of the constitutional order.

Looking at the current state of health of cooperative constitutionalism in Europe, the (very) good news is that the ICC, even if taking the existence of a contrast the between the ruling in *Taricco* and the Italian constitutional order for granted, has not (immediately) applied the counter-limits doctrine, but has preferred, for the third time in history, to seek interpretative assistance and guidance from the CJEU.

However, the enforcement of the counter-limits doctrine could be simply postponed in this case. In fact, more than a request of assistance and guidance, the new reference is an urgent and “last resort” request for clarifications. Actually, the ICC has decided to give a “last “chance to the CJEU to clarify, or better to change, its view in *Taricco* and interpret Article 325 TFEU in a way that would make the conflict with the supreme constitutional principle of legality, less strong and evident, albeit without removing the same.

Against this background, and it is again a good news for the season of cooperative constitutionalism in Europe, the reference indeed is not even a request for clarifications, but for “revisitation” and, in other words, the last attempt to avoid a constitutional collision between the two legal orders.

The facts of the case

The judgment of the CJEU in *Taricco* has brought to the fore the problem of the interaction between EU law and the fundamental principles of the domestic constitutional order.

In the case at issue, Mr. Taricco and other individuals had been placed under investigation by the Court of Cuneo over allegations they committed VAT frauds. The frauds occurred between 2005 and 2009. In the relevant criminal proceedings, the Judge for Preliminary Hearing, after a long investigation by the Public Prosecutor, had to determine whether there were grounds for committing the defendants to trial.

Under the Italian Criminal Code, the limitation period for prosecuting tax fraud cases is quite narrow. According to the Judge for Preliminary Hearing of the Court of Cuneo, all the crimes would have been time-barred by 8 February 2018 at the latest, before a final judgment could be delivered. As a result, the defendants may most likely enjoy *de facto* impunity.

In the view of the Court of Cuneo, by establishing a strict limitation period, Italy was in breach of the obligation under EU law to take measures to contrast illegal activities affecting the financial interest of the Union. Therefore,

the Judge for Preliminary Hearing asked the CJEU whether such a limitation was compatible with EU law. This was indeed a rather unambiguously speculative stance: the goal of the reference to the CJEU was, definitely, to obtain a *nulla osta* from the CJEU to prosecute the case the without time-barring effects.

The CJEU, not without substantially reframing the preliminary questions (with the support of the Advocate General Kokott), based its judgment on the interpretation of Article 325 TFEU. According to the CJEU, this provision, on one hand, "*obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures"* while, on the other one, *"obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests".*

The CJEU then found that "*a provision of national law on limitation periods for proceedings which, for reasons relating to the scheme of that provision, has the effect in many cases of exempting from punishment the perpetrators of fraud in matters of VAT is incompatible with the aforementioned provisions of EU law"*. Accordingly, "*in pending criminal proceedings, the national courts must refrain from applying such a provision".*

The CJEU also excluded that requiring national courts to do so would amount to a breach of the principle of legality under Article 49 of the Charter. In the view of the CJEU, in fact, the scope of the principle of legality does not include the statute of limitations, treated as a purely procedural matter that falls out of the scope of the principle of retroactivity in criminal law. It is worth noting that the CJEU did only – and rather problematically – consider this profile of the principle of legality, whereas no regard was paid to the different one regarding the lack of precision in criminal law.

The judgment raised a wide range of uncertainty among scholars and courts. Although the CJEU has not specified whether in case the conditions above are met national courts shall apply a longer limitation period or not apply any limitation period at all, this outcome would anyways be in contrast with the principle of legality, enshrined in Article 25 of the Italian Constitution, according to the well established interpretation provided by the ICC (with respect to both the prohibition to retroactively apply provisions *in peius* regulating statute of limitation and the requirement of precision in criminal law).

Unlike the CJEU, in fact, the ICC has interpreted the principle of legality as prohibiting a retroactive application *in peius* of the limitation period (or the non-application of the same) over the time.

The different understanding of this principle has then resulted in a conflict between EU law and the Constitution. How to resolve this clash?

On one hand, should domestic courts refrain from enforcing the *Taricco* judgment, the primacy of EU law would be most likely undermined.

On the other hand, the ICC reiterated the counter-limits doctrine as a means of protecting national constitutional identity (judgment no. 183/1973) vis-à-vis EU law in order to prevent the Union institutions form exerting any inadmissible power to violate the fundamental principles of the constitutional order.

A few days after the CJEU handed down the decision, the ICC was thus asked by both the Court of Appeal of Milan and the Supreme Court to rule on whether the doctrine of counter-limits prevented national courts from enforcing the *Taricco* judgment.

The order by which the ICC has now raised a new reference to the CJEU does not specifically take position in this respect. However, it is clear enough that the order constitutes a last, rather polemical cooperative step to avoid a *de plano* ruling that would enforce the counter-limits doctrine to prevent the *Taricco* decision from interfering with the fundamental principle of legality.

The order of the ICC

The view of the ICC on the relationship between EU law and the principle of legality that is behind the order can be summarized with this sentence (p. 3): "*It is not disputed that, when it comes to criminal law, the principle of*

legality does amount to a supreme principle of the legal order aimed at protecting inviolable rights of individuals to the extent that it requires criminal provisions to be precise (a profile that the CJEU has not considered at all in *Taricco*) *and it prevents criminal provisions from having any retroactive effects in peius*". That being said, the Court points out that: "*If Article 325 of the Treaty on the Functioning of the European Union results in a legal norm that is contrary to the principle of legality, as noted by the referring ordinary courts, the Constitutional Court will have the duty to prohibit it".*

The ICC is aware that the conflict between Article 325 TFEU and the principle of legality stems from the different understanding of the latter. Even if most of the Member States treat statute of limitation as a purely procedural matter not affecting the principle of legality, the existence of a pretty common view in this regard is binding neither on Italy nor on the European Union. In fact, the statute of limitation is completely unrelated to the scope of application of EU law. Accordingly, no harmonization of the relevant provisions is required and Member States are free to consider statute of limitation as a matter of procedure or substantive criminal law. This point has not even been challenged by the CJEU, whose scope of investigation was limited to Article 49 of the Charter, without prejudice to the national constitutional traditions.

Having clarified that, the ICC focuses on the reasons why a reference to the CJEU is necessary to obtain the correct interpretation of Article 325 TFEU, i.e. of the ruling given in *Taricco*.

The ICC specifies that, in order to be compatible with the Constitution, the "rule of conduct" established by the CJEU must be in accordance with the requirement of precision (*determinatezza*) that is constitutionally mandated for any criminal law provision. The same, in fact, must be clear and precise, in order to allow individuals to figure out and foresee the consequences of their conduct and to circumscribe judicial discretion as well.

As the same CJEU had highlighted, the principle of legality falls within the category of Member States constitutional traditions as part of the principle of legal certainty.

The assessment to be carried out, in the view of the Court, is twofold.

First of all, it must be determined whether an individual might reasonably foresee, in light of the legal framework in force at the time of his conduct, that Article 325 TFEU would have prevented national courts from applying the national provisions on statute of limitations, provided that the conditions set forth by the *Taricco* judgment were met. The answer of the ICC to this question is clearly a negative one but it is for the CJEU to clarify the correct significance of Article 325 TFEU.

Second, a similar assessment must be carried out on whether the powers of national courts are properly circumscribed when it comes to applying the provisions regarding the statute of limitation. In this respect, the principle of legality does not come into question insomuch as the retroactivity of criminal law provisions is concerned but rather to the extent that the power to amend the existing provisions rests in the hands of legislators and not of judges. According to the ICC, it is practically impossible that the circumstance that in a significant amount of cases offenders are exempted from punishment as a consequence of the short statute of limitation can be assessed in accordance with the aforesaid constitutional requirements, i.e. without relying on judicial discretion.

In other words, the decision to prosecute a case or to declare the crime time-barred would hinge on a discretionary evaluation – and not on a precise legal requirement – whose outcome may even vary from court to court. Behind the ICC reasoning, it seems that the vagueness of the reference made by the CJEU to the significant amount of cases where crimes are time-barred is meant to be structurally incompatible with the national understanding of the principle of legality.

Thus, even in the case the Court found that statute of limitation must be interpreted as a purely procedural matter, another constitutional obstacle to the enforcement of the *Taricco* judgment might lie with the requirement that the power to determine the content of criminal law provisions (as well as when they apply) rests solely in the hands of legislators and not of judges. The same principle of precision, indeed, is deemed by the Court to be enshrined in Article 49 of the Charter. All the more, then, an assessment on the actual effects of Article 325 must

be carried out in this respect.

In this regard, it is worth noting that the ICC bravely expresses the concern that this interpretation of the principle of legality would most likely be in contrast even with Article 49 of the Charter and with the European constitutional tradition on the limits to judicial discretion.

Having focused on the reasons why a clash occurs between the principle of legality and the *Taricco* ruling, the ICC wonders if the CJEU actually imposed its ruling to be enforced by domestic courts even in case it conflicts with a fundamental principle of the national legal order. The ICC has a clear answer to this question, and it is an absolutely negative one, but nevertheless it has chosen to involve (again) the CJEU in a dialogue, in order to give them the chance, basically, to clarify and, if necessary, revisit the construction of the *Taricco* ruling and avoid a constitutional clash.

According to the ICC, the CJEU in *Taricco* expressly recognized the power for national courts to carry out the assessment on the compatibility of the decision with the constitutional order. On one hand, at para. 53 of the judgment the CJEU has noted that "*if the national court decides to disapply the national provisions at issue, it must also ensure that the fundamental rights of the persons concerned are respected".* On the other one, para. 55 specifies that the disapplication is nevertheless "*subject to verification by the national court*". Then, the key question that the ICC wishes to refer to the CJEU is whether by these statements the CJEU assumed that Article 325 TFEU (and therefore the *Taricco* ruling, in the end) is applicable only provided that it is compatible with the national identity or better, with the constitutional tradition, of the concerned Member State and that is for the competent authority of the said Member State to carry out that assessment. If this interpretation were correct, according to the constitutional judges, there would be no room for a contrast between EU law and the Italian legal order. Accordingly, the reference made by the Court of Appeals of Milan and the Court of Cassation to the ICC would be rejected.

Final remarks

Some interesting conclusions can be drawn by the reference by the ICC to the CJEU.

First of all, the ICC seems to have revisited the relationship between primacy of EU law and fundamental rights protection as construed in *Melloni*.

In this respect, the ICC argues that the *Taricco* case is different from the *Melloni* one. In *Melloni* it was questioned whether the domestic legislation was compatible with EU law to the extent that it introduced additional requirements for the execution of an European arrest warrant. According to the ICC, in that case a different decision by the CJEU would have compromised the unity of EU law, most notably in a field (that of the European arrest warrant) based on mutual trust between Member States and the European Union. On the contrary, the primacy of EU law is not called into question in *Taricco*: the ruling (i.e. the significance of Article 325 TFEU as interpreted by the Court) is not challenged by the ICC but rather the existence of a constitutionally mandated obstacle to the enforcement of the same is called into question. This obstacle merely lies in the different understanding of the principle of legality. As a consequence of that, EU law does not prevent applying a higher degree of protection like that enshrined in the Italian Constitution, since the same does not impact the primacy of EU law.

This clarification is a very important aid that the ICC is offering to the CJEU. The ICC, in fact, aims at preventing any possible tension surrounding the need to safeguard the primacy of EU law and, generally speaking, the supremacy of the European Union. In the view of the ICC, there is no such burden for the judges sitting in Luxembourg because the ICC expressly excludes that the question to be examined is a matter of primacy and, accordingly, of supremacy of legal orders.

A second significant point relates to the concept of constitutional identity. The ICC has specified that the principles that came into question in *Taricco* deal with the constitutional identity of Member States. However, the ICC particularly emphasizes the importance of the constitutional traditions, including both the national and the European ones. In the view of the ICC, the existence of a common constitutional tradition does not prevent each

Member State from adopting a specific understanding of the same principle, most notably where the relevant area of law has not been subject to harmonization. Also in connection to the primacy of EU law, then, there is room for Member States to retain a particular view of constitutional principles without affecting supremacy of the European legal order.

This factor is to a certain degree surprising since what a constitutional court would be expected to object to the application of EU law is that its constitutional identity may be undermined. Instead, the ICC takes a different view and, even without neglecting the relevance (also) of the constitutional identity, it focuses more on the notion of constitutional tradition(s)

In other words, the ICC seems to propose, with regard the constitutional conflict, an alternative language, with regard the protection of the untouchable core of the constitutional legal order, in comparison with identity based language spoken by the German Constitutional Tribunal in, for instance, *Gauweiler*. It is the language of the necessary protection of constitutional tradition, which turns out to be *by design* a European law concept and for sure is more in line with the actual season of cooperative constitutionalism in Europe. This is another important signal of the cooperation that the ICC wishes to establish with the CJEU. A court willing to contrast the enforcement of EU law and, maybe, even its primacy would have played the game differently, through the stronger defense of the constitutional identity.

Even more interesting is the shift, in the ICC reasoning, from the national constitutional tradition to the European one. More precisely, the ICC suggests as that the interpretation of the principle of legality given by the CJEU in *Taricco* may most likely be in contrast with the same Article 49 of the Charter. The ICC has noted that the scrutiny on the compatibility of the *Taricco* "rule of conduct" with the Charter was limited to the profile related to the retroactivity of criminal law, while no argument was made to the extent that the principle of precision of criminal law is concerned. This principle, in fact, is itself a common constitutional tradition among Member States (at least in continental Europe), as long as it prevents judicial interference with law-making, most notably when it comes to criminal law. Leaving courts the power to define a key element of a criminal offense, like allowing courts to prosecute a crime or not depending on whether crimes are time-barred in a significant amount of cases, would therefore infringe the European constitutional tradition on the principle of legality.

Again the language of the constitutional tradition(s) prevails on that one which focuses on constitutional identity. The ICC calls the CJEU's attention to this point and notes that this interpretation is probably not even compatible with EU law.

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